United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7237

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, et al.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR PLAINTIFFS-APPELLEES,
BRITISH AIRWAYS BOARD AND
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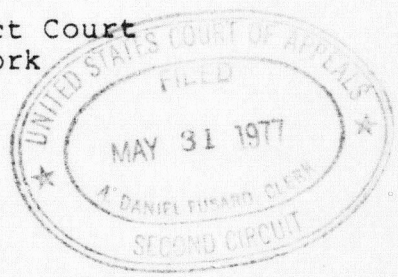

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BRIEF FOR PLAINTIFFS-APPELLEES, BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE

STATEMENT OF ISSUE PRESENTED

Statutes, regulations and treaties create a pervasive scheme of Federal responsibility for aviation safety and technology, aircraft noise, and the regulation of international commercial flights. The issue presented is whether the Port Authority may lawfully prevent the plaintiff foreign carriers from operating flights of Concorde aircraft into and out of John F. Kennedy International

Airport despite this scheme and in the face of express Federal authorization of such flights.

STATEMENT OF THE CASE

This is an appeal from a Judgment entered by the United States District Court for the Southern District of New York (Milton Pollack, D.J.) on May 20, 1977, enjoining the Port Authority of New York and New Jersey from barring or otherwise interfering with flights of the supersonic aircraft Concorde at John F. Kennedy International Airport that have been authorized by the Federal Government. (JA 182a-84a)* The Judgment was based on a 31-page opinion filed by Judge Pollack on May 11, 1977. (JA 149a et seq.) The District Court held that the actions of the Port Authority in purporting to ban operations of Concorde at JFK were in irreconcilable conflict with the Federal authorization of such operations.

The Federal Authorization of Concorde Flights

On February 4, 1976, United States Secretary of Transportation, William T. Coleman, Jr., issued a 61-page Decision, based upon analysis of all relevant factors. He concluded:

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* "JA" refers to the Joint Appendix herein.

> "After careful deliberation, I have decided for the reasons set forth below to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a trial period not to exceed 16 months under limitations and restrictions set forth below. I am thus directing the Federal Aviation Administrator . . . to order provisional amendment of the operations specifications of [the airlines] to permit those carriers, for a period of no longer than 16 months from the commencement of commercial service, to conduct up to two Concorde flights per day into JFK by each carrier, and one Concorde flight per day into Dulles by each carrier." (Coleman Dec. 3; JA 53a.) (Footnotes omitted.)

The Coleman Decision was the culmination of a Federal regulatory process extending more than a year, and represented a most important milestone in an unprecedented 15-year international effort to develop a civil supersonic air transport. Developed jointly by the United Kingdom and France at a cost in excess of $3 billion, the Concorde represents an extraordinary technological advance. Capable of flying at twice the speed of sound, the Concorde approximately halves the travel time between the United States and Western Europe. Like earlier technological breakthroughs in transportation, it promises to foster commerce, trade and intercourse between the peoples of the world. The British and French governments and people are deeply committed to Concorde, both financially and as an object of national pride.

British Airways and Air France, the principal flag air carriers for their respective home countries, are the only carriers that own and operate the Concorde. These airlines have long been designated by their respective home governments as the airlines authorized to fly between their home capitals and New York pursuant to the bilateral agreements between the United States and the United Kingdom and France.* They both hold foreign air carrier permits issued by the Civil Aeronautics Board with the approval of the President pursuant to Sections 402 and 801 of the Federal Aviation Act, 49 U.S.C. §§ 1372, 1461. These permits specify that the carriers are entitled to fly the New York-London and New York-Paris routes.** The British and French civil aviation authorities have certified Concorde as an airworthy aircraft. These certificates of airworthiness have been accepted by the United States as proof of the safety of Concorde, as required by international agreement. The foreign air

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* Air Services Agreement between the United States and the United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507 (February 11, 1946) ("the Bermuda Agreement") (JA 434a); Air Services Agreement between the United States and France, 61 Stat. 3445, T.I.A.S. No. 1679 (March 27, 1946) ("the Paris Agreement") (JA 447a).

** See CAB Order 74-4-17, approved by the President on April 2, 1974 (British Airways) (JA 369a); CAB Order 69-12-58, approved by the President on December 11, 1968 (Air France) (JA 379a).

carrier permits allow the use of any aircraft certified as airworthy, and the CAB has denied applications to amend the British Airways and Air France permits to prohibit the use of Concorde.*

The only remaining requirement imposed on the carriers by federal law was amendment of their Operations Specifications to name Concorde. Operations specifications are issued by the Federal Aviation Administration, which is responsible for, among other things, airspace control and aircraft safety. They designate airports to be used and routes or airways to be flown. They also prescribe operating rules to be followed in flight and upon landing or take-off and designate the type of aircraft each foreign air carrier may fly. See 14 C.F.R. § 129.11.

The federal administrative proceedings leading to the issuance of the amended Operations Specifications began in 1974 when the British and French governments informally advised the FAA of the intention of British Airways and Air France to commence Concorde service at JFK and Dulles in 1976. Later, British Airways and Air France formally applied to the FAA for appropriate amendments of their Operations Specifications.

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* See CAB Order 76-4-21, Docket 28347, April 6, 1976.

Because such an amendment was considered a "major federal action" that might significantly affect the quality of the human environment within the meaning of the National Environmental Policy Act, Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970), the FAA undertook the preparation of an environmental impact statement. A draft statement was released by the FAA on March 3, 1975, and circulated for public comment. Public hearings were held on the draft in New York, Washington and Virginia in April 1975. A final impact statement was released by the FAA on November 13, 1975, reflecting consideration of the hearings and more than 2900 comments received.

On that same day, Secretary Coleman announced that he would personally make the decision whether Concorde flights to the United States would be authorized, and ordered a public hearing at which he would personally preside. This unusual procedure was followed by the Secretary because of the "unprecedented issues of public policy" raised by Concorde. (Coleman Dec. 1; JA 51a.) On January 5, 1976, the Secretary heard seven hours of testimony from over 60 witnesses, including representatives of the carriers, their governments, the Environmental Protection Agency, the State of New York, various New York and Virginia county governments, several former officials of the Port Authority, and dozens of other elected officials

and private citizens. The Secretary thereupon invited additional comments, specifically requesting views on a number of legal and technical issues. Based on this additional material, a revised summary of information, comment and response was issued as an addendum to the final impact statement, and the FAA issued a statement on January 14, 1976, analyzing issues that had been raised concerning the safety of Concorde.

Finally, on February 4, 1976, the Secretary issued his "Decision on Concorde Supersonic Transport." The Secretary stated the issue before him in this way:

> "The issue before me is whether to permit Concorde supersonic transport aircraft, manufactured jointly by the British and French, to operate in limited scheduled commercial service to and from the United States as follows: not more than four flights per day into John F. Kennedy International Airport (JFK) located on Long Island, New York, and not more than two flights per day into Dulles International Airport located in Fairfax and Loudoun Counties, Virginia." (Coleman Dec. 1; JA 51a.)

In resolving this issue, the Secretary drew upon the broad range of statutory authority and responsibility conferred upon him by Congress. His decision reflected a painstaking analysis and balancing of the many competing environmental, safety, technological and foreign relations interests posed by the introduction of Concorde into commercial service in this country:

> "The overall decision whether to permit Concorde operations into this country is much more than a safety decision. . . . It involves substantial questions of environmental and aviation policy and international relations. As the Secretary of Transportation, I am charged by the DOT Act with 'the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation. . . .' I am directed 'to stimulate technological advances in transportation . . . (and) provide general leadership in the identification and solution of transportation problems. . . .' Under the Federal Aviation Act, as amended by the DOT Act, I am also instructed to 'encourage and foster the development of civil aeronautics and air commerce in the United States and abroad.'" (Coleman Dec. 13-14; JA 62a-63a.) (Footnotes omitted.)

Secretary Coleman did not treat the issue as simply one of granting or denying the airlines' applications for amendments to their operations specifications. Rather, he saw those applications, and the $3 billion investment of the British and French governments in this new technology, as an opportunity for the United States to gain invaluable experience regarding the technological, environmental and economic characteristics of commercial supersonic flight. The limited scope of the authorization and the terms and conditions thereof reflect this decision. Indeed, Secretary Coleman observed that, "[i]f the Concorde can compete, or if Concorde operations demonstrate

that a more efficient, larger capacity SST could compete, then the British and French, and perhaps the Americans, might be encouraged to undertake the research effort necessary to develop a profitable and environmentally more acceptable aircraft." (Coleman Dec. 52-53; JA 101a-102a.) (Emphasis supplied.)

Relying upon his broad statutory powers to encourage the development of civil aviation and stimulate technological advances, the Secretary authorized Concorde operations as a federal experiment -- a 16-month demonstration period at each airport. He explained the need for the experiment as follows:

> "I have concluded that the benefits of an environmentally sound, commercially viable SST would be substantial. I am also convinced that we do not yet have sufficient information upon which to make a judgment about whether such an aircraft could be developed. Given the substantial effort by the French and British to initiate this technology, and the fact that United States participation may well be essential to the commercial success of the SST, I believe this demonstration is needed to determine whether a commitment to this new technology should be embraced." (Coleman Dec. 61; JA 110a.)

Pursuant to the Secretary's Decision, the plaintiffs' Operations Specifications were duly amended to permit Concorde operations under carefully controlled conditions at JFK. These conditions included, among other

things, a curfew on take-offs and landings in the United States between 10 p.m. and 7 a.m.; a prohibition of supersonic flights over the United States; and the imposition of such noise abatement procedures as are safe, technologically feasible and economically justified. They also specify particular procedures for takeoffs at JFK.

The Operations Specifications expressly reserve to the FAA the right to revoke permission "at any time upon four months' notice, or immediately, in the event of an emergency deemed harmful to the health, welfare or safety of the American people," as required by the terms of the Secretary's Decision. (JA 362a, 366a.)

The State of New York, the Environmental Defense Fund, Nassau County (New York) and Fairfax and Loudoun Counties (Virginia) filed petitions in the United States Court of Appeals for the District of Columbia Circuit to review the Secretary's Decision.* Its legality was ques-

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* A number of collateral proceedings were also commenced in an effort by Concorde opponents to countermand Secretary Coleman's Decision. In Fairfax County v. McLucas (D.D.C. No. 76-0139), Fairfax County sought to enjoin any Concorde flights until issuance of supersonic noise regulations by the FAA; in a second action, Fairfax County v. McLucas (E.D.Va. No. 76-467-A), the County attempted to enforce a noise ordinance banning supersonic aircraft at Dulles. In Citizens League Against the Sonic Boom v. CAB (D.D.C. No. 76-

(Footnote continued)

tioned on a number of grounds, including the Secretary's statutory authority to make his Decision. In a brief unanimous order issued the day of oral argument, the Court of Appeals held that Secretary Coleman's "order for . . . a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law." Environmental Defense Fund v. U.S. Department of Transportation, No. 76-1105 (D.C. Cir. May 19, 1976). The Supreme Court denied certiorari on November 16, 1976. (97 S. Ct. 385 (1976).)

While appellate proceedings were pending, a number of bills and resolutions were introduced in Congress in an attempt to reverse Secretary Coleman's Decision. All

(Footnote continued)

1062), several environmental groups are seeking review of a CAB order refusing to issue an environmental impact statement prior to approval of Concorde fares. Other collateral proceedings before the CAB included: Petition of EDF for Amendments of Foreign Air Carrier Permits to Forbid Use of Concorde SST (CAB Docket No. 28347); Petition of EDF for Amendments of Foreign Air Carrier Permits to Forbid False and Deceptive Advertising as to Effect of Concorde SST on "Jet Lag" (CAB Docket No. 29242); and Petition of EDF for Amendment of Foreign Air Carrier Permits to Require Safety Warnings as to Concorde SST (CAB Docket No. 29541). None of the suits or proceedings has been successful in blocking Concorde flights.

were either defeated* or died in committee.**

Concorde flights commenced at Dulles on May 24, 1976 and have continued to the present -- a full year now.

The Port Authority's Concorde Ban and the Decision Below

On March 11, 1976, British Airways and Air France notified the Port Authority that they intended to schedule commercial flights of Concorde at JFK beginning on or about April 10, 1976. (JA 32a-33a.) Within hours, the Port Authority passed a resolution banning Concorde flights at JFK, asserting as the ground for its decision a desire to make an independent evaluation of noise data and community reaction to the Concorde, based upon operating experience at Dulles, Heathrow Airport in London, and Charles de Gaulle Airport in Paris. (JA 35a-38a.) This litigation followed.

On May 11, 1977, the District Court rendered its

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* Senate--Proposed Amendments to S.4308 of Senators Weicker, Beall and Bumpers. See Cong. Rec. March 25, 1976, S.4308 et seq. House--Proposed Amendments to Airport and Airway Development Act of 1976. See Cong. Rec. June 28, 1976, H.6874 et seq.

** H.R. 11692 (Cong. Rec. Feb. 4, 1976, H. 740);
H.R. 11745 (Id. Feb. 5, 1976, H. 812);
H.R. 11754 (Id. H. 813);
H.R. 11775 (Id. Feb. 9, 1976, H. 872);
H.R. 11901 (Id. Feb. 17, 1976, H. 1107);
H.R. 12087 (Id. Feb. 25, 1976, H. 1321);
H.R. 12134 (Id. Feb. 26, 1976, H. 1378);
S.2930 (Id. Feb. 4, 1976, S. 1172);
S.2030 (Id. Feb. 24, 1976, S. 2203).

decision, holding that the Port Authority's ban of Concorde flights authorized by the Federal Government was unlawful. The District Court found that the Port Authority had claimed for itself the right to frustrate the Concorde experiment ordered by Secretary Coleman and implemented by the amended Operations Specifications issued by the FAA. Specifically, the Court found (i) that the Federal Government has authority, under the Constitution and pursuant to the Federal Aviation Act and the Department of Transportation Act, to preempt conflicting local regulation of Concorde flights at JFK; and (ii) that the Federal aviation authorities had exercised that power in authorizing Concorde flights. The Port Authority's attempted ban of Concorde flights conflicted irreconcilably with the Federal actions. The Court held:

> "[T]he PA resolution in effect nullifying the permits to the air carriers based on a purpose of PA to re-review the noise criteria applicable to the use of the Concorde at JFK, is in irreconcilable conflict with the federal examination of the question and the federal orders thereon and the PA resolution must give way under the Supremacy Clause in the Constitution."
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> * * *
>
> "Nullification or stultification of the federal review of the noise problem at JFK is not a prerogative of the PA. The superseding federal orders were founded in federal statutes or regulations. . . . The PA resolution of March 11, 1977 is void and plaintiffs are entitled to the declaration and injunction they seek." (Opinion 29, 31; JA 179a, 181a.)

SUMMARY OF ARGUMENT

In City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973), the Supreme Court held that the "pervasive nature of the scheme of federal regulation of aircraft noise" preempted local governmental regulation of aircraft by means of curfews or other local controls directed at flights of aircraft. The Supreme Court there recognized that the need for "a delicate balance between safety and efficiency . . . and the protection of persons on the ground" was compatible only with a "uniform and exclusive system of federal regulation . . . ." (Id. at 638-39.)

While the Court in Burbank did not specifically consider whether Congress had also preempted local regulation by a municipality acting as a "proprietor", the reasons which led the Supreme Court to find that Congress had preempted local government regulation under the "police power" apply equally to such regulation by local units of government acting as "airport proprietors."

The District Court did not, however, need to reach or decide that broad issue. Nor need this Court do so. The Department of Transportation and the Federal Aviation Administration have at least the power to preempt a local ban of Concorde; and the Court below correctly held that the Federal authorities had, in fact, preempted the ban on

Concorde flights which the Port Authority has unilaterally imposed.

The foregoing arguments would apply to all air carriers; but here, the airlines are foreign flag carriers whose activities in the United States are governed by bilateral air services agreements between the United States, the United Kingdom and France which leave no power in the Port Authority to deny to the carriers the right to fly the routes designated by those agreements, and to utilize aircraft approved by the Federal Government pursuant to the agreements. Both the Bermuda and Paris Agreements permit only the Federal Government to limit Concorde service by the carriers. Thus, the Port Authority's Concorde ban violates this country's unambiguous treaty obligations, as well as impermissibly interfering with the conduct of this country's foreign relations. For this entirely distinct reason, the District Court's decision should be upheld.

ARGUMENT

I

THE PORT AUTHORITY'S BAN OF CONCORDE FLIGHTS CONFLICTS WITH AND IS PREEMPTED BY SECRETARY COLEMAN'S DECISION AND ORDER AND THE OPERATIONS SPECIFICATIONS ISSUED THEREUNDER

The District Court opened the legal discussion that led to its ruling in favor of these plaintiffs by saying, "A straightforward question of federal supremacy is raised in this case." (Opinion 6; JA 155a.) The District Court was clearly right in answering this question in favor of Federal power. The guiding principle is indeed simple and straightforward. Regulation by states and their political subdivisions may not stand if it conflicts with Federal regulation or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Federal regulation. Among the many cases so holding are De Canas v. Bica, 424 U.S. 351 (1976); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

This principle of Federal preemption of conflicting state action is almost as old as the Republic itself. As early as Gibbons v. Ogden, 22 U.S. (9 Wheat. 1, 211 (1824), Chief Justice Marshall stated the principle: "[A]cts of the State Legislatures . . .[that] interfere with, or are contrary to the laws of Congress, made

in pursuance of the constitution" are invalid under the Supremacy Clause of the Constitution, Art. VI, cl. 2.

It is beyond dispute that Secretary Coleman had the constitutional and statutory authority to issue his decision authorizing Concorde flights into and out of JFK. In a proceeding brought to review the Coleman Decision, the Court of Appeals for the District of Columbia Circuit so held:

> "The Secretary has decided, for the reasons stated in his opinion, 'to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a period not to exceed sixteen months under limitations and restrictions set forth [in that opinion].' The purpose of the trial period is to provide additional information to assist the Secretary in his evaluation of the 'environmental, technological, and international considerations' which continued operation of Concordes into this country would involve.
>
> "This court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law." (Environmental Defense Fund v. U.S. Department of Transportation, No. 76-1105 (D.C. Cir. May 19, 1976), cert. denied, 97 S.Ct.385 (1976).)

The Port Authority's attempted ban on Concorde flights impairs, interferes with and stands as an obstacle to the accomplishment of Secretary Coleman's purposes.

The Secretary stated that the demonstration ordered by him "is needed to determine whether a commitment to this new [SST] technology should be embraced." (Coleman Dec. 61; JA 110a.) The Secretary's Decision reflected his view that the Concorde experiment he was authorizing would serve important national interests, including the promotion of international aviation and technological improvements.*

In these circumstances, the national interest may not be frustrated by local regulation admittedly intended to serve the parochial interests of the communities surrounding JFK. Secretary Coleman expressly stated that such efforts at obstruction by the Port Authority would impair the benefits to be derived from the experiment. He said that if for any "legitimate and legally binding reason it should turn out that the JFK part of the demonstration could not go forward [it] would obviously be extremely unfortunate and would greatly diminish. . . the validity of the demonstration" that he had ordered. (Coleman Dec. 3 n.6; JA 53a.)

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* The Joint DOT/FAA Aviation Noise Policy Statement ("ANAP Statement") issued in November 1976, also indicates that the results of Concorde tests are a necessary prerequisite to the development of Federal supersonic noise regulations (See ANAP Statement 8; JA II-8.)

Secretary Coleman clearly had the authority to direct that the Concorde demonstation at JFK be undertaken. Counsel for the Port Authority expressly conceded at oral argument before Judge Pollack on April 28, 1977, that Secretary Coleman's "powers of control of development planning and noise control and abatement and the promotion and undertaking of research and development [are] superior to the authority of the Port Authority." (Opinion 30; JA 180a.) The Port Authority asserted below, however, that no such preemptive action by the Federal authorities had occurred because, as stated most clearly by the Port Authority at oral argument, "What you need for the Federal Government to supersede local authority would be an express declaration that it has superseded local authority." (Id.)

It is not a prerequisite to Federal preemption that Federal officials announce that they "intend" to supersede local authority.

As the District Court held:

> "There was no need for the Secretary to announce expressly in his decision that he was preempting any regulation of the PA such as the one requiring PA permission for jet aircraft to land at JFK (its only avowed noise regulation). See City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973). Nor was it necessary to expressly announce that the federal policy 'in certain circumstances' to authorize the airport proprietor to regulate noise was inapplicable to the provisional permit granted.

The Secretary's decision makes this inapplicability manifest." (Opinion 21-22; JA 170a-71a.) (Emphasis supplied.)

The Federal aviation authorities, having been fully satisfied that the Concorde demonstration at JFK was in the national interest and should be undertaken, granted to the airlines all Federal authorizations needed for the flights to begin.* In these circumstances, as Judge Pollack stated, "[l]abelling the action taken would seem to be supererogation." (Opinion 30; JA 180a.) Secretary Coleman ordered the FAA to issue an order "amending the operations specifications of British Airways and Air France. . . ." (Coleman Dec. 61; JA 110a.) The FAA did so.** The unequivocal amendments to the Operations Speci-

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* It bears emphasis that the Port Authority has repeatedly conceded that Secretary Coleman granted to British Airways and Air France all federal authorizations necessary to commence Concorde operations at JFK. (Appellants' Brief I-4, IV-1.)

** The instructions issued by the Federal Aviation Administration to the Assistant Administrator on April 2, 1976, state:

> "The amendment as approved permits regular Concorde service to only John F. Kennedy International Airport in New York and Dulles International Airport serving Washington, D.C. Commercial service to any other airport in the United States may not be provided without further authorization."
>
> * * *
>
> "It is directed that the operations specifications be issued to the carriers." (JA 360a-61a.)

fications explicitly authorize each air carrier "to conduct two Concorde flights a day, scheduled or chartered, to and from the John F. Kennedy International Airport, New York. . .for a period not to exceed 16 consecutive months." (JA 362a, 366a.)

The "terms and conditions" required by the Secretary in his Decision are fully incorporated in the airlines' amended Operations Specifications. Among other things, they include precisely detailed regulations of the type that airport proprietors have heretofore attempted to promulgate, including procedures for takeoffs at JFK, turns after takeoff away from populated areas in the airport vicinity, and specific instructions with respect to takeoffs from certain runways. (JA 362a-63a, 366a-67a.)

The Port Authority places heavy reliance here, as it did in the District Court, upon a construction of the Coleman Decision as intending that the Port Authority have a right to veto that authorization and the national interests it was found to serve. This construction is based upon (1) a notice issued by Secretary Coleman on November 13, 1975 (Addendum to Appellants' Brief 1a-2a), (2) a footnote on page 3 of the Coleman Decision (Coleman Dec. 3, n.6; JA 53a), and (3) post-decision statements of Secretary Coleman in a press release (JA 45a-46a) and Congressional

testimony (See Appellants' Brief IV-3-IV-4).*

On November 13, 1975, notice was issued when Secretary Coleman contemplated only a limited proceeding to amend the carriers Operations Specifications. At least as of November 1975, Secretary Coleman was not referring to or contemplating Concorde service at JFK as a Federal experiment undertaken pursuant to the Secretary's powers to develop national transportation policies and programs, stimulate technological advances in aviation and encourage and foster the development of civil aviation. (JA 62a-63a.) In February 1976, however, the Secretary went far beyond the routine, technical inquiry involved in amending Operations Specifications, noting that "[a] requested amendment of operations specifications can also serve other statutory ends." (JA 62a.) The Secretary then created a "limited and controlled demonstration" that would permit "further assessment of the environmental impact, measuring noise levels during actual commercial operations, evaluating subjective

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* The Port Authority misleadingly cites Udall v. Tallman, 380 U.S. 1 (1965), for its point that the construction by a federal agency of its own regulations is entitled to great weight by a reviewing court. That principle is noncontroversial, but wholly inapplicable here. Such agency "construction" of its regulations takes the form of formal legal opinions of agency counsel, or concrete administrative action in enforcing agency regulations, not informal news releases and similar materials relied upon here.

community response to the Concorde's unique noise characteristics, determining relative fuel efficiency per passenger mile, monitoring air pollution, and enabling stratospheric testing." (Coleman Dec. 60; JA 109a.)

Footnote 6 to the Coleman Decision and the post-decision statements of the Secretary cannot fairly be read as intending that the Port Authority have a veto power. Read in full and in context they do no more than recognize the likelihood of litigation over the preemptive effects of the Decision and that that question will be determined by the Federal courts.

The Port Authority has consistently confused what the District Court saw as a Federal policy of permitting airport proprietors to act, in some cases, to regulate the use of airports, and the power of the FAA and DOT to preempt such actions when necessary to effectuate important and superseding Federal purposes. The Federal Government has never implied that it lacks the power to take preemptive action, and none of the various statements made by Federal officials and quoted by the Port Authority, reflects any concession that the Federal power in this area may not be supreme, when exercised. Indeed, Judge Pollack noted that "[t]he November 18, 1976 statement of the Department of Transportation correctly expresses the caveat that local

regulations may not override national purposes," (Opinion 19; JA 168a), and he quoted the following from the DOT/FAA ANAP Statement:

> "While the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Pursuant to the general federal interest . . . and the specific FAA responsibility for regulating the air navigation system, the federal government has the obligation to assure that airport actions to meet local needs do not conflict with national and international purposes." (Opinion 19; JA 168a; JA II-58.) (Emphasis added.)

Judge Pollack's decision appropriately held that the Port Authority could not countermand an express directive by the Federal Government that Concorde flights be conducted at JFK. "Nullification or stultification of the federal review of the noise problem at JFK is not a prerogative of the PA." (Opinion 31; JA 181a.)*

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* Seizing upon footnote 6 of the Secretary's decision, the Port Authority concluded in its March 11, 1976 Resolution that its ban against Concorde flight operations was justified because such a ban would, as stated in the footnote of the Secretary's opinion, "greatly diminish, but . . . would not destroy, the validity of the demonstration." (Coleman Dec. 3 n. 6; J.A. 53a.) There is, of course, no rule that permits state and local governments to "greatly diminish" the effectiveness of federal policy so long as the federal policy is not "destroyed." (J.A. 46a; see Opinion 13; J.A. 162a.)

II

THE PORT AUTHORITY'S BAN OF CONCORDE FLIGHTS IS PREEMPTED BY A PERVASIVE NATIONAL SCHEME OF REGULATION OF AVIATION

The District Court's finding that the Federal authorities had acted in such a way as specifically to preempt the Port Authority's ban of Concorde flights made it unnecessary for the Court to consider the broader grounds urged by the airlines as a basis for finding the Port Authority's Concorde ban to be unlawful. If those broad grounds are considered, the rationale of City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) -- that the comprehensive federal statutory system of aircraft regulation precludes inconsistent local action -- applies here, and precludes any action by the Port Authority to regulate aircraft flight operations.

As the Port Authority readily concedes (see Opinion 30-31; JA 180a-81a), the constitutional power of the Federal Government to regulate commerce under the Commerce Clause, Art. I, § 8, cl. 3, clearly extends to regulation of the use of an airport such as JFK. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824). This Federal power has been exercised to establish a comprehensive Federal scheme of aviation regulation.

As noted by Mr. Justice Jackson some thirty years ago:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Concurring opinion.)

The Federal Aviation Act, 49 U.S.C. §§ 1301 et seq., gives the Federal Aviation Administration exclusive authority to regulate the use of navigable air space, including landings and take-offs, to establish air navigation facilities, and to operate a national system of air traffic control. (Id. at §§ 1301(26), 1348.) The FAA also has the authority to prescribe aircraft equipment standards (Id. at § 1421) and to license aircraft (Id. at § 1423), aircraft operators (Id. at § 1422), and airports (Id. at § 1432). Moreover, Congress has directed the aviation authorities to make long-range plans for the use of navigable air space and location of landing areas to "undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers

and appliances." (49 U.S.C. § 1353.)*

In 1966, Congress created the Department of Transportation and gave the Secretary of Transportation broad policy-making responsibility for transportation matters generally and aviation matters specifically. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966), codified at 49 U.S.C. §§ 1651 et seq. He was directed to "exercise leadership" in transportation matters in the United States and abroad and to "provide leadership in the development of national transportation policies and programs," including "noise abatement, with particular attention to aircraft noise." (49 U.S.C. § 1653(a)). The Secretary of Transportation was directed "to assure the coordinated effective administration of the transportation programs of the Federal Government" and to

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* Judge Pollack observed that within this Congressional mandate "it has been appropriately held that test flights of commercial supersonic transports (such as the Concorde) in the course of a sonic boom program were an appropriate exercise" of the FAA's function. (Opinion 8; JA 157a.) The District Court cited Coxsey v. Hallaby, 231 F.Supp. 978, 979 (W.D. Okla. 1964), where the court held:

> "The FAA is authorized under 49 U.S.C. § 1353(b) to conduct tests which tend to the creation of improved aircraft. The SST clearly falls within the category of such 'improved aircraft.'" (Id. at 979.)

"stimulate technological advances in transportation" (Id. at § 1651(b)(1)), including specifically "the development and construction of a civil supersonic aircraft" (Id. at 1655(c)(1)),

More recently, Congress has granted the Federal aviation authorities broad and comprehensive authority to regulate aircraft noise. In 1968, Congress enacted Section 611 of the Federal Aviation Act, granting the FAA explicit power to prescribe regulations for the "control and abatement of aircraft noise." (49 U.S.C. § 1431.) In 1972, Congress amended Section 611 as a part of the comprehensive Noise Control Act of 1972 and expanded the mandate given to Federal authorities to control and abate aircraft noise. Among other things, the amendments gave the Environmental Protection Agency a formal role in the promulgation of aviation noise regulation. Senator Tunney, sponsor of the 1972 Amendments, stated that the regulations under Section 611 would include:

> "proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and modifications in the number, frequency, or scheduling of flights [in addition to] the imposition of curfews on noisy airports, the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission standards

> on new and existing aircraft -- with the expectation of a retrofit schedule to abate noise emissions from existing aircraft -- the imposition of controls to increase the load factor on commercial flights, or other reductions in the joint use of airports, and such other procedures as may be determined useful and necessary to protect the public health and welfare." (118 Cong. Rec. 37317 (1972).) (Emphasis supplied.)

Taken together, these statutory grants of authority over aviation, aircraft flight operation, airspace management and aircraft noise serve to preempt totally the Port Authority's purported ban of Concorde flights.*

In City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the Supreme Court held that local government curfews on aircraft flights were preempted by the complex and comprehensive scheme of Federal regulation of aircraft noise contained in Section 611. The holding of the Supreme Court is all the more striking because it was

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* Virtually every court which has considered the question has found that the pervasive federal regulation of flight operations preempts any efforts of state and local governments to regulate aircraft flight. See, e.g., City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Air Transport Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); American Airlines, Inc. v. City of Audubon Park, Kentucky, 297 F. Supp. 207 (W.D. Ky. 1968), aff'd, 407 F.2d 1306 (6th Cir.), cert. denied, 396 U.S. 845 (1969); Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956); Opinion of the Justices, 359 Mass. 778, 271 N.E.2d 354 (1971); San Diego Unified Port District v. Superior Court, 67 Cal. App.3d 361, 136 Cal. Rptr. 557 (1977).

made in the face of the Solicitor General's argument that local regulation was not so preempted.* In holding that local government regulation was preempted by Federal law, the Court said:

> "Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. . . . The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. . . . Any regulations adopted by the Administrator to control noise pollution must be consistent with the 'highest degree of safety.' . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.
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> "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." (Id. at 638-39.) (Footnotes omitted.)

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* The Government's position was, no doubt, influenced by the question whether Federal preemption would shift liability for taking of property made uninhabitable by aircraft noise from local airport proprietors to the Federal Government, a liability theretofore imposed on local airport proprietors. See Griggs v. Allegheny County, 369 U.S. 84 (1962) discussed, infra, pp. 37.

Burbank did not specifically reach the question whether units of local government "acting as proprietors" could do what they could not do pursuant to their police powers. (Id. at 636, n.14). But as the dissenters in Burbank noted:

> "the Hollywood-Burbank Airport is probably the only nonfederal airport in the country used by federally certified air carriers that is not owned and operated by a state or local government. . . . It simply strains credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews." (Id. at 651-52.)

Certainly, the evils of continued local regulation and the resultant lack of uniformity are equally present whether local authorities act in their "governmental" or "proprietary" capacities.* If the Port Authority, for example, is free to impose a Concorde ban, it can ban as

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* The Port Authority and other similar airport operators are, in any event, far more than mere "proprietors." The Port Authority operates JFK under an airport operating certificate issued by the FAA pursuant to Section 612 of the Federal Aviation Act, 49 U.S.C. § 1432. The development of JFK has been funded in part by federal grants given by the Secretary of Transportation "in order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics. . . ." (49 U.S.C. § 1714.) As the recipient of such federal grants, JFK is a "public airport" within the meaning of 49 U.S.C. § 1711(15), defined inter alia as an "airport which is used or to be used for public purposes."

well other aircraft such as 707's, DC 10's or 747's, and that right would extend equally to every other airport proprietor in the country. The disruptive effect of such a regime on the national system of air transportation would be at least as great as that involved in Burbank. The proprietor of a major international airport such as those in New York or Los Angeles could, in effect, dictate to airlines and airports throughout the country and the world the kinds of aircraft that could be used in national and international commerce. The need for uniform national and international regulation precludes all local interference with flight operations, whether such local interferences takes the form of "police powers" regulation or regulation by "airport proprietors."

The Department of Transportation, the Federal Aviation Administration and the Civil Aeronautics Board recognized the need for uniform national and international regulation prior to the Supreme Court's Burbank decision. In 1971, these Federal agencies submitted to the Supreme Judicial Court of the Commonwealth of Massachusetts formal legal opinions on the constitutionality of proposed legislation that would prohibit "supersonic transport planes from landing or taking off in the Commonwealth." (JA 407a-20a.) The DOT and FAA considered the proposal unconstitutional "for the reasons that the Federal Government has preempted

the regulation of airspace and aircraft operations, and because the Commerce Clause of the United States Constitution requires that air commerce be regulated by a single authority, the Congress of the United States." (JA 402a.) In words that are equally applicable to the Port Authority's Concorde ban, the two Federal agencies expressed the view that the proposed SST prohibition was an unlawful "attempt . . . to regulate air traffic and airspace." (JA 414a.)

> "Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace." (Id.)

The CAB joined in the views of DOT and FAA, emphasizing that "an attempt to proscribe or regulate the flight of aircraft by any state instrumentality is equally forbidden, and this is irrespective of whether it takes the form of a state law, a municipal ordinance or a directive from the manager of an airport owned or controlled by state or municipal bodies." (JA 420a.) (Emphasis in original.)

The Port Authority, however, persists in the argument that "Congress' intent in the field of air commerce regulation was not to preempt, but rather to preserve, the right of airport proprietors to impose nondiscriminatory restrictions on the aircraft users of their

air terminals like the temporary ban here at issue." (Appellants' Brief 2.) For this proposition the Port Authority relies solely on some items in the history of the enactment of Section 611 in 1968. This material was before the Court in the Burbank case. The Court there said, "These statements do not avail appellants." (411 U.S. at 634.)*

Three cases, decided since Burbank, squarely considered this question whether local governmental units have authority, in the interests of noise control, to impose restrictions on flights into and out of airports pursuant to their alleged powers as proprietors. In Air Transport Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975) and San Diego Unified Port District v. Superior Court, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), petition for hearing denied by California Supreme Court, April 28, 1977, the courts flatly rejected the claim that such authority exists.

In Crotti, the court distinguished between noise control measures which could be implemented by the airport proprietor without interference with flights (such as acquiring on-the-ground easements and landscaping) and those

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* Judge Pollack analyzed the same legislative materials and found nothing more than the existence of an Executive policy of allowing airport proprietors to act with respect to noise in some circumstances and in some particulars

measures which might require the banning or restricting of certain flights. In holding that restrictions of the latter type unlawfully invaded the exclusive regulatory province preempted by the Federal Government's pervasive scheme of regulation of aircraft flight operations, the court held that any such regulations were:

> "a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce. The thrust of the Single Event Noise Exposure Levels is clear and direct and collides head-on with the federal regulatory scheme for aircraft flight delineated by and central to the Burbank decision." 389 F. Supp. at 65.

Similarly, in San Diego, the California District Court of Appeal, relying on Burbank, held that federal laws and regulations preempted local control of aircraft flights, stating:

> "A majority of the Supreme Court reasoned in Burbank the interdependence of such concerns as safety, efficiency and noise control 'requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.' . . . If a curfew interferes with this perceived requirement of uniformity, it should make no difference whether the curfew is imposed on the authority of local police power or the owner's proprietary power. The impact of the

> curfew remains the same--interference with flight schedules at other airports and local flight congestion immediately before and after the hours of curfew.

And further:

> "The Burbank Court acknowledged 'the Hollywood-Burbank Airport may be the only major airport which is privately owned.' . . . The vast majority of national airports are operated by municipalities or governmental entities such as the Port District. If the limitation of footnote 14 is construed as [suggested], local regulation by municipal airport 'proprietors' would not be preempted by federal law, and 'Burbank becomes a decision of nearly unique application' (Warren, 'Airport Noise Regulation: Burbank, Aaron and Air Transport,' 5 Environmental Affairs 97, 106, fn. 56). 'If the great bulk of airport noise cases are not to be affected, . . . the rationale of Burbank is defeated.'" (136 Cal. Rptr. at 561.)

Only National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976), found meaningful the distinction between actions taken by a local governmental unit as proprietor, and those taken pursuant to police power. In Hayward, the court declined to issue a preliminary injunction against enforcement of a city ordinance establishing a nighttime curfew on flights at the Hayward Air Terminal, even though the court candidly acknowledged that its decision "severely undercut(s) the rationale of Burbank's finding of preemption." (418 F. Supp. at 424.) Hayward was, in our view, an aberration and wrongly decided, and should not be followed by this Court.

The Port Authority has offered but one justification for the claimed distinction between airport proprietors and other forms of governmental regulation. It claims that Griggs v. Allegheny County, 369 U.S. 84 (1962), creates liability against airport proprietors for the "taking" of adjacent property due to aircraft noise, and hence that Griggs must necessarily establish a right in such proprietors to control noise by banning aircraft.*

Even in Griggs, however, there was no suggestion that airport proprietors could relieve themselves of liability by imposing curfews, banning aircraft or the like, in derogation of federal regulatory authority. To the contrary, the Court noted that the method by which such liability could be limited was through purchase or condemnation of additional property surrounding the airport. (See 369 U.S. at 90.)

In any event, it by no means follows that the risk of liability creates in the airport proprietor a power to exclude aircraft, and thus to intrude into an area of exclusive federal regulations. In San Diego, for example, the Court held that an airport could be held liable for

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* Interestingly enough, however, the Port Authority also argues that Griggs was "wrongly decided," presumably because of the comprehensive nature of Federal regulation of aircraft and airports. (Appellants' Brief I-21 n.8.)

the "taking" of adjoining property, notwithstanding that such "taking" might result from flights which the airport proprietor had no right to exclude.

There is, in any event, no realistic possibility that the limited number of Concorde flights at issue here could give rise to the liability that the Port Authority professes to fear. As noted by Judge Pollack, "The period of exposure to aircraft noise on takeoff would be short, generally under a minute -- or less than four minutes a day in all at JFK" and Concorde operations would constitute no more than eight operations out of a current daily average total of nearly 1,000 operations at that airport. He further noted that Secretary Coleman had concluded that the impact of Concorde flights at JFK would be "relatively little compared to the existing levels of noise exposure." (Opinion 13; JA 162a.)

Finally, as Judge Pollack noted in an earlier decision in this case, affirmed by this Court, there is a substantial likelihood that the Port Authority will be relieved of even "taking" liability where, as here, aircraft operations result from specific authorization by federal aeronautical authorities. See British Airways Board, et ano. v. The Port Authority of New York and New Jersey, et al., No. 76 Civ. 1276 (S.D.N.Y. July 6, 1976), aff'd without opinion, No. 76-7339 (2d Cir. Nov. 8, 1976); citing Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959).

III

THE PORT AUTHORITY'S CONCORDE BAN VIOLATES PLAINTIFFS' VESTED RIGHTS UNDER BILATERAL AGREEMENTS BETWEEN THE UNITED STATES, THE UNITED KINGDOM AND FRANCE

The conduct of international air transportation services to and from this country is governed by a network of international agreements. These include the Chicago Convention, which is the basis of the post-World War II system of international air commerce (JA 460a et seq.), and bilateral air service agreements regulating scheduled air services between the United States and foreign countries. Among the latter are the Bermuda and Paris Agreements between the United States and the United Kingdom and France, respectively. (JA 434a-59a.)

These Agreements do not permit the Port Authority to withhold or revoke the authority granted by the Federal Government to British Airways and Air France to conduct regularly scheduled Concorde flight operations between London and New York and Paris and New York. Once the carriers have obtained the requisite foreign air carrier permits authorizing service over those routes, and once the federal decision has been made to grant the carriers operations specifications designating Concorde as a type of aircraft that may be flown on those routes, the plaintiffs

have vested rights under the bilateral air services agreements that may be exercised immediately.

All the requirements of the international agreements have been satisfied for Concorde flights to and from JFK. Although the District Court held that it was "unnecessary" to pass upon the question whether the Port Authority resolution conflicts with international agreements and foreign policy (Opinion 31; JA 181a), these grounds do, in fact, offer an alternative basis for affirming the District Court's decision.

To illustrate this critical point, we outline the Bermuda Agreement provisions that show how the legal rights of British Airways to operate any aircraft on the London-New York route are established and regulated. The provisions of the Paris Agreement are substantially identical.

By Article 1 of the Bermuda Agreement, the United States and the United Kingdom reciprocally grant one another rights to establish air services as described in an Annex to the Agreement. These "agreed services" include a London-New York route for British carriers.* In the Annex, the rights

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* Article 1 provides:

> "Each Contracting Party grants to the other Contracting Party rights to the extent described in the Annex to this Agreement for the purpose of the establishment of air services described therein or as

(Footnote continued)

related to those "agreed services" on the specified routes are stated--in mandatory language--to include "the use on the said routes at each of the places specified therein of all the airports (being airports designated for international air services) . . . ."* JFK is such an airport.

Under Article 2, "agreed services" may be begun by British carriers when they receive operating permission

(Footnote continued)

amended in accordance with Section IV of the Annex (hereinafter referred to as 'the agreed services')." (JA 434a.)

Article I of the Paris Agreement is in substance the same. (JA 447a-48a.)

* Section I of the Annex provides:

"For the purposes of operating air services on the routes specified below in Section III of this Annex or as amended in accordance with Section IV hereof, the designated air carriers of one of the Contracting Parties shall be accorded in the territory of the other Contracting Party the use on the said routes at each of the places specified therein of all the airports (being airports designated for international air services), together with ancillary facilities and rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail in full accord and compliance with the principles recited and agreed in the Final Act of the Conference on Civil Aviation held between the Governments of the United States and of the United Kingdom at Bermuda from January 15 to February 11, 1946, and subject to the provisions of Section II [rates] and V [change of gauge] of this Annex." (JA 439a.) (Emphasis added.)

Section III of the Annex to the Paris Agreement is similar and uses equally mandatory language. (JA 452a.)

from the United States. The grant of such permission is subject only to the provisions of Articles 2(2) and 6 of the Agreement. Under Article 2(2), the carrier "may be required to satisfy the aeronautical authorities"* of the United States that it is "qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers."** Under Article 6, "[e]ach

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* For the United States, both agreements define the "aeronautical authorities" as the Civil Aeronautics Board and "any person or body authorised to perform the functions presently exercised" by that Board, which today includes the Department of Transportation and the Federal Aviation Administration. (Bermuda Agreement Art. 12(a) (JA 437a); Paris Agreement Art. IX(b) (JA 450a).)

** Article 2 provides in pertinent part:

> "(1) The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted, but not before (a) the Contracting Party to whom the rights have been granted has designated an air carrier or carriers for the specified route or routes, and (b) the Contracting Party granting the rights has given the appropriate operating permission to the air carrier or carriers concerned (which, subject to the provisions of paragraph (2) of this Article and of Article 6, it shall do without undue delay).
>
> "(2) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers." (JA 434a-35a.)

Article II of the Paris Agreement is comparable. (JA 448a.)

Contracting Party reserves the right to withhold or revoke the exercise of the rights specified in the Annex" to the Agreement "in case of failure by [a] carrier to comply with the laws and regulations referred to in Article 5 hereof . . . ." (JA 436a, 449a.) Those are the "laws and regulations" relating to the entry and departure and the operation and navigation of aircraft in international service while they are within that country's domestic territory.*

British Airways has satisfied each of the requirements established by the Bermuda Agreement and relevant United States statutes. Thus, it has been designated by Her Majesty's Government for the London-New York route that is named in the Annex to the Bermuda Agreement as a route for a British carrier. It has received operating permission for that route from the United States through its "aeronautical authorities." Those authorities have satisfied themselves, in accordance with Article 6, of British Airways' compliance with the laws and regulations

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* Article 5 provides, in its pertinent paragraph (1):

> "The laws and regulations of one Contracting Party relating to entry into or departure from its territory of aircraft engaged in international air navigation or to the operation and navigation of such aircraft while within its territory shall apply to aircraft of the designated air carrier or carriers of the other contracting Party." (JA 436a.)

Article V of the Paris Agreement is similar. (JA 449a.)

referred to in Article 5. The CAB expressly found British Airways fit, willing and able to comply with those laws and regulations when it granted a foreign air carrier permit for the London-New York route, pursuant to Section 402 of the Federal Aviation Act.* In the proceedings concluded by Secretary Coleman's Decision, as a result of which the FAA amended British Airways' Operations Specifications to name Concorde as a type of aircraft that may be flown into and from JFK, there was a thorough inquiry (independent of that made by the CAB) into the compliance of Concorde with all conceivably pertinent "laws and regulations". Upon these bases, Secretary Coleman granted British Airways the right to use Concorde at JFK.

The same process has occurred in the case of Air France and its use of Concorde on the Paris-New York route, operating at JFK.

These authorizations have vested in British Airways (under the Bermuda Agreement) and Air France (under the Paris Agreement) rights to serve New York with Concorde on a specified route through JFK. Under the straightforward language of Articles 5 and 6 of the international

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* C.A.B. Order 74-4-17, approved by the President April 2, 1974, [British Airways] (JA 369a). See also C.A.B. Order 69-12-58, approved by the President December 11, 1969 [Air France] (JA 379a).

agreements, those rights can not be legally withheld or revoked by an entity that clearly is not one of the "Contracting Parties" to the agreements. Neither the Bermuda and Paris Agreements provide any basis for a claim by the Port Authority that it may interfere with rights vested under the agreements by limiting the route rights of a duly designated air carrier when these have been confirmed by the Federal Government.

Far from "ignoring" the provisions of Article 5 of the Bermuda Agreement, and Article V of the Paris Agreement (as is alleged by some of the Port Authority's amici in their briefs to this Court), we believe these provisions are inapposite here. Even assuming that Concorde might fail to satisfy one of the "laws and regulations" of the United States, as that phrase is used in Article 5 of the Bermuda Agreement and Article V of the Paris Agreement -- and there is no basis whatever for such a claim -- it is plain that these provisions of the agreements create no regulatory authority in the Port Authority to seek to enforce such laws or regulations. The only provision which establishes a power to withhold or revoke rights to operate aircraft on a designated route is contained in Article 6 of the Bermuda Agreement (and Article VI of the Paris Agreement), which vests such power to take action in the event of a failure to

comply with a relevant law or regulation in the "Contracting Party."

Beyond the fact that only one of the "Contracting Parties" to the agreements -- and not some other entity -- can revoke operating rights vested in a foreign carrier, the two agreements also make it plain that the only relevant basis for such a revocation is the failure of a carrier to comply with the applicable "laws or regulations" of the Contracting Party. (Bermuda Agreement, Art. 5 (JA 436a); Paris Agreement, Art. V (JA 449a).) The Port Authority's General Counsel acknowledged at oral argument on April 28, 1977, that the Port Authority's purported Concorde ban is not a "law or regulation" of the United States. (JA 281a-82a.) There is, therefore, no conceivable basis for a claim that the carriers' vested rights to operate Concorde may be revoked under the respective international agreements. As the Supreme Court declared in Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796):

> "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way . . . If a law of a State, contrary to a treaty, is not void, but voidable only, by a repeal or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole."

See also United States v. Pink, 315 U.S. 203 (1942); Bacardi Corp. of America v. Domenech, 311 U.S. 150 (1940); United States v. Belmont, 301 U.S. 324, 331-32 (1937).

Neither the Port Authority nor its amici claim for it any authority to act inconsistently with the international obligations of United States. The Port Authority and its amici are, in effect, claiming that the Port Authority may act as one of the "Contracting Parties" to the agreements in enforcing its own decision as to whether Concorde aircraft should be permitted into JFK. There is no basis whatever for this novel claim of authority in the agreements themselves, nor is there any authority that the Port Authority has power based solely on its ownership of JFK to frustrate the unambiguous international commitments of the United States.

IV

THE PORT AUTHORITY'S CONCORDE BAN SUBSTANTIALLY INTERFERES WITH THE EXCLUSIVE AUTHORITY OF THE FEDERAL GOVERNMENT TO CONDUCT THE FOREIGN RELATIONS OF THE UNITED STATES

The international agreements discussed above represent the formal and concrete expression of the constitutional power of the Federal Government to conduct the foreign relations of the United States. The Federal decision to admit Concorde for a trial period into JFK and Dulles represents a most sensitive exercise in foreign relations.* This was made clear in a communication to Secretary Coleman from the Secretary of State. In response to a request for his views on the Concorde issue, Secretary Kissinger wrote:

> "In terms of our political relations, we realize that this project, in which both governments have invested very large sums, represents a unique achievement by both Britain and France in a high technology aircraft that commands close attention at the highest levels in both countries, as well as intense public and governmental interest in view of the financial stake and national prestige involved in placing the Concorde into commercial service, and especially into transatlantic service.

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* As recently as Friday, May 27, 1977, in its Motion For Extension of Time, the United States represented to this Court that this matter involves "delicate questions of foreign . . . affairs," requiring coordination of the "highest levels of the federal government."

> Under these circumstances, it is apparent that any Administration decision that would amount to an outright rejection of the applications of the two airlines for the limited service they intend to begin next year would be viewed as a serious blow by two of our closest friends and allies, whose interests coincide with our own in so many areas." (JA 405a-06a.)

Secretary Coleman expressly recognized these foreign relations considerations in his decision. He referred to:

> (a) The fact that "Concorde represents a 13-year commitment of almost three billion dollars by the British and French governments, who are among our closest allies and our best customers of United States goods. Prestige, economic vitality, and employment stability are at stake." (Coleman Dec. 54; JA 103a.)
>
> (b) The fact that "[s]ervice to the United States on the lucrative North Atlantic market was from the first a substantial element in the Concorde program, and denying the aircraft landing rights in this country could well abort the program." (Id.)
>
> (c) The concern that a negative decision on the Concorde "might easily have been perceived as discriminatory for two reasons:" first, that "the United States would be open to the charge that we treated our own aircraft more favorably than those of foreign countries in regulating aircraft noise," and second, that "the British and French might justifiably feel that the United States was discriminating in its attitude toward stratospheric pollution." (Id. at 54-55; JA 103a-04a.)

(d) The concern that, "[a]part from appearance of discrimination, the British and French might perceive in a negative decision an unfair element of surprise, a defeat of justifiable reliance," since such a decision "might well be perceived by our allies as the imposition of a penalty for which they were not given notice." (Id. at 55-56; JA 104a-05a.)

(e) The fact that "the British and French might well feel that the United States had taken advantage of the benefits of the relatively free and open international aviation structure while being unwilling to pay the costs. . . . In view of the history of the United States dominance of the aviation industry, it would be quite remarkable if such a decision were not considered to be unfair." (Id. at 56; JA 105a.)

(f) The concern that a negative decision on the Concorde might be "attributed to an arbitrary and protectionist attitude of the United States out of fear that our dominance of the world aeronautical manufacturing market is threatened." (Id. at 61; JA 110a.)

The Supreme Court has repeatedly held that the states may not intrude into the field of foreign relations, even if federal legislation or treaties do not expressly deal with the subject at hand. See, e.g., Zschernig v. Miller, 398 U.S. 429 (1968). No more may a specialized non-federal agency such as the Port Authority. As noted in Hines v. Davidowitz, 312 U.S. 52, 63 (1941):

"The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted

> with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

See also United States v. Pink, 315 U.S. 203, 232 (1942); Bethlehem Steel Corp. v. Board of Comm'rs of Dept. of W. & P., 276 Cal. App.2d 221, 80 Cal. Rptr. 800 (2d Dist. 1969).

CONCLUSION

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) first announced the constitutional principle that federal action preempts and invalidates state and local laws which "though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress. . . ." The State of New York in Gibbons sought to ban from its waters the use of a new technology -- vessels under steam -- unless licensed by the State, despite the fact that they had been licensed by the Federal Government, much as the Port Authority has tried to prevent the federally-licensed operations of the Concorde.

Chief Justice Marshall rejected that claim.

> "The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." (Id. at 213-14.)

He concluded that where a federal license exists, "the law must imply a power to exercise the right," and the State may not interfere. (Id. at 212.) Accord, Douglas

v. Seacoast Products, Inc., 45 U.S.L.W. 4488 (U.S. May 23, 1977).

With relatively minor variations, precisely the same issue is presented here: May the Port Authority of New York and New Jersey close its airport to a type of aircraft that has a federal license to conduct flights. The answer remains unchanged since Gibbons v. Ogden: A state or one of its political subdivisions may not act to frustrate federal regulatory actions.

The federal executive officer entrusted with appropriate responsibility by Congress for making such a decision has ordered that Concorde operations at John F. Kennedy International Airport be allowed, and has held that such operations are in the national interest. The issue before the Court is whether the Port Authority may countermand this decision. The Port Authority's Concorde ban is illegal -- it invades an area of preempted federal regulatory authority, violates this country's treaty obligations and interferes with the conduct of this country's foreign rela ons.

For all the reasons assigned, the judgment of

the court below should be in all respects affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants-Appellants.

No. 77-7237

ATTORNEY'S AFFIRMATION OF PERSONAL SERVICE

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, an attorney at law of the State of New York and a member of the Bar of this Court, affirms:

1. I am associated with Rogers & Wells, attorneys of record for plaintiff-appellee, Compagnie Nationale Air France;

2. On May 31, 1977, at 9:30 A.M., I served the annexed BRIEF FOR PLAINTIFFS-APPELLEES, BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE, on Patrick J. Falvey, Esq., attorney for defendants-appellants, at his office, Room 67E, One World Trade Center, New York, New York, by leaving two true copies thereof with his clerk or other person in charge;

3. I affirm the foregoing statements to be true under the penalties of perjury.

Dated: New York, New York
May 31, 1977

Stephen Fooling
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